SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-981

In the Matter of the Complaint of

MORAN INLAND WATERWAYS CORPORATION, as owner, and MORAN TOWING & TRANSPORTATION CO., INC., as chartered owner of Tug MARGOT MORAN,

Petitioners,

for exoneration from or limitation of liability.

SEABOARD SHIPPING CORPORATION, Claimant,

Respondent.

In the Matter of the Complaint of

SEABOARD SHIPPING CORPORATION, as owner of the Barge Oil Transfer 32,

Respondent;

for exoneration from or limitation of liability.

MORAN INLAND WATERWAYS CORPORATION and MORAN TOWING & TRANSPORTATION CO., INC., Claimants,

Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION

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The Question Presented Is Without Merit

The question presented by petitioner raises no matter of general concern or interest, the decision of which would

settle any conflict in the authorities or settle any question of Federal law. The question presented is of importance only to the litigants in this case.

The petition seeks to make it appear that the decision of the Court of Appeals is in violation of the "clearly erroneous" rule laid down by this Court in *McAllister* v. *United States,* 348 U.S. 19 (1954) (Petition, p. 7). This contention clearly is without merit, since the Court of Appeals did not reject any of the findings of fact as such made by the District Court. On the contrary, it held that under the facts of the case, the tug failed to exercise that measure of care and diligence which it owed to its tow which was wholly within its control and dependent on it for its safety.

To support this contention petitioner argues that the Court of Appeals in effect acted *sua sponte* and in disregard of the acceptance by respondent of the alleged findings of the District Court which the Appeals Court overturned (Petition, p. 7). Thus petitioner says, relating to the course change made by the tug at 0930 November 2 to head northeasterly across the Lake toward the east shore—a distance of approximately 50 miles (Petition, p. 9):

> "The District Court found that this course change was made 'so that the flotilla would head into the weather and seas' and was 'not unreasonable'. • • • The Court of Appeals decision reverses that Finding although the evidence fully supported it and Seaboard expressly accepted it."

And further, relating to the circumstance that the tug continued on after receiving a special gale warning at 1330 November 2 when, as found by the District Court, the tug could still have turned back and made haven at Sheboygan (Finding 14, Petition, p. 21a), petitioner says that Seaboard accepted the District Court's finding that this was "not unreasonable" (Petition, p. 9).

Again, petitioner says (Petition, p. 11):

> "Where, as here, the District Court has found the facts in detail with meticulous care (infra 16a-24a) and where Seaboard has expressly stated that it 'takes no exception' to these Findings the Court of Appeals should not be permitted to reverse on the facts without first demonstrating that the Findings were 'clearly erroneous'."

These statements by petitioner are gross distortions of respondent's argument in the Court of Appeals. Thus respondent in its brief in the Court of Appeals said at page 5:

> "With the facts, as such, set forth in the Opinion, Paragraphs 6 through 27 (323a-329a), Seaboard takes no exception. Seaboard does, however, dispute the conclusions drawn by the Court as to the reasonableness of, and absence of negligence in, the various changes of course made by the tug during this rather erratic odyssey in ever increasing winds and seas through the open waters of the expanse of Lake Michigan from 8:30 A.M. on November 1, 1966 to 8:00 A.M. on November 4."

And again, at page 10:

> "On Seaboard's claim against Moran the Court held that Capt. McDonald's conduct under all of the circumstances was not unreasonable and that he was not negligent (Op. Par. 30, 331a). This involves a finding of fact under an applicable standard of care. It is not purely a fact finding and is open to review. Barbarino v. Stanhope S.S. Co., 151 F.2d 553 (CA 2, 1945); Kreste v. United States, 158 F.2d 575 (CA 2, 1946); Lynch v. Agwilines, 184 F.2d 826 (CA 2, 1950)."

The Court of Appeals in holding that Moran's conduct under all of the circumstances was negligent clearly recognized the "clearly erroneous" test. Thus the Court of Appeals said (Petition, p. 8a):

> "In Cleary v. United States Lines Co., 411 F.2d 1009 (2d Cir. 1969), this court recently reaffirmed its long-held view that the 'clearly erroneous' test of Rule 52(a), Fed. R. Civ. P., does not apply to findings of negligence (or lack of it) although the conclusion of the district judge after a careful examination of the facts is entitled to great weight. We must therefore examine the trial court's ultimate determination in the light of its findings and the evidence. Esso Standard Oil Co. v. S.S. Gasbras Sul, 387 F.2d 573 (2d Cir.), cert. den. 391 U.S. 914 (1968)."

What petitioner here seeks is really not a writ of certiorari but a further appeal from the decision of the Court of Appeals.

CONCLUSION

The petition fails to show any adequate or appropriate reason why certiorari should be granted and should accordingly be denied.

Respectfully submitted,

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